IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of July 1, 2005, Morgan Stanley ABS Capital I Inc., Trust 2005-HE3 Mortgage Pass-Through Certificates, Series 2005-HE3,	
Plaintiff,	
v.	No. 12 C 3644
HERBERT ELESH,	Chicago, Illinois
	May 20, 2013
Defendant.	10:30 a.m.

TRANSCRIPT OF PROCEEDINGS - EVIDENTIARY HEARING
BEFORE THE HONORABLE RONALD A. GUZMAN

APPEARANCES:

For the Plaintiff:	MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED BY: MR. JUSTIN FOREST CARTER One East Wacker Drive Suite 2500 Chicago, Illinois 60601 (312) 383-6492
For the Defendant:	MR. HERBERT N. ELESH Pro Se 401 South Milwaukee Avenue #160 Wheeling, Illinois 60090 (847) 465-1900

(Proceedings heard in open court:)

THE CLERK: 12 C 3644, Deutsche Bank v. Elesh.

MR. CARTER: Good morning, your Honor. Justin Carter appearing on behalf of plaintiff.

MR. ELESH: Good morning. Herbert Elesh, pro se.

THE COURT: Good morning.

MR. ELESH: Good morning.

THE COURT: Are we ready to proceed?

MR. CARTER: Yes, we are, your Honor. I have an Ocwen -- a representative from Deutsche Bank -- excuse me -- a representative from Ocwen Loan Servicing, who is the servicer for Deutsche Bank, the plaintiff, who is prepared to provide testimony with regard to the note.

THE COURT: Okay.

MR. CARTER: Very good.

THE COURT: Call your witness.

MR. CARTER: Thank you, your Honor. The plaintiff calls Ms. Michelle Jones.

MICHELLE JONES, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. CARTER:

Q. Ms. Jones, please state your name for the record.

A. Michelle Jones.

Q. And what is your current occupation?

A. I'm a loan analyst with Ocwen Loan Servicing.

Q. And have you ever been convicted of a felony or a crime concerning dishonesty or fraud?
A. No.
Q. And how long have you been employed by Ocwen Loan Servicing?
A. Since August of 1999.
Q. And, generally speaking, can you tell us what Ocwen Loan Servicing's connection is to this case?
A. We are the servicer for Deutsche Bank. We handle all of the servicing aspects of this loan, which is collection of payments, escrow disbursements and any kind of correspondence with the borrower.
Q. And as part as -- of -- of a servicer, would the servicer's responsibility necessarily include being a custodian for the loan documents or at least keeping track of those documents?
A. Yes.
Q. And are you familiar with the -- how Ocwen keeps its records in the ordinary course of business for this loan?
A. Yes.
Q. And are you familiar with Deutsche Bank's business records for this case as it relates to Ocwen's servicing --
A. Yes.
Q. -- of the loan?
And what do Deutsche Bank and Ocwen's records reflect

in terms of the loan in this particular case?
A. That it is in default.
Q. Could you identify for us who the borrower is on this loan?
A. Can I see a document? I can't remember the name offhand.
Q. Okay. We'll get to that. That's fine.
A. Okay.
MR. CARTER: Your Honor, may I approach the witness?
THE COURT: You may.
MR. CARTER: Thank you.
BY MR. CARTER:
Q. Ms. Jones, I'm handing you what's been identified as Plaintiff's Exhibit 1 and 2.
MR. CARTER: And, your Honor, I believe you should have a copy in front of you as well.
BY MR. CARTER:
Q. Can you tell me what these two documents are that I placed before you?
A. Exhibit 1 is a copy of the original promissory note, dated March 4, 2005. Exhibit 2 is a copy of the recorded mortgage, also dated March 4, 2005.
Q. And based on your review of Deutsche Bank and Ocwen's records and your familiarity with both, is this the mortgage, the note, which Deutsche Bank owns and Ocwen is currently servicing?

A. Yes.
Q. And are these copies of the original mortgage and notes kept in the ordinary course of business that's regularly conducted with Ocwen and Deutsche Bank?
A. Yes.
Q. And was making a copy of the original mortgage and notes a regular practice of that business activity?
A. Yes.
Q. And is there anything about the copy of the note, the mortgage itself, which might indicate that somehow this copy is not trustworthy?
A. No.
MR. CARTER: Now, your Honor, at this time I'd like to move that Exhibits P 1 and P 2 be placed in the record as business records of the plaintiff.
THE COURT: Any objection?
MR. ELESH: No objection.
THE COURT: Plaintiff's Exhibit 1 and 2 are admitted without objection.
BY MR. CARTER:
Q. And, Ms. Jones, now that you have Plaintiff's Exhibit 1 and 2 before, can you tell us a little bit more about the loan, such as who the borrower is and how much the loan is for?
A. Yes. The borrower is Herbert N. Elesh. The amount of the

loan is $147,600.

Q. And regarding the notes, who was the note made out to? Who is it paid to?

A. Decision One Mortgage Company, LLC.

MR. CARTER: Your Honor, may I approach the witness again?

THE COURT: Yes.

MR. CARTER: Thank you.

BY MR. CARTER:

Q. Ms. Jones, I've handed you two additional documents. Can you tell me what these documents are?

A. Yes. These are the original copies -- I mean, yes, the originals of the mortgage and also the original promissory note.

Q. And are these originals accurate and truthful copies of what has been entered into evidence as Plaintiff's Exhibit 1 and 2?

THE COURT: Well, first of all, do you want to give these documents a designation so we know what they are?

MR. CARTER: Because they're originals, your Honor, I can't really enter them into evidence. I don't want to mark them up, but certainly we can call them --

THE COURT: You don't have to deface the document to enter it into evidence.

MR. CARTER: Okay. And that's --

THE COURT: You can ask that it be considered marked as exhibit something or other.

MR. CARTER: Okay.

THE COURT: Or you can find some other way of marking it that doesn't deface it --

MR. CARTER: Okay.

THE COURT: -- such as a non- --

MR. CARTER: Very good, your Honor. I'll do that.

BY MR. CARTER:

Q. Ms. Jones, now that you've had a chance to review the original note and mortgage before you, are those truthful -- are those accurate copies of Plaintiff's Exhibit 1 and Exhibit 2?

THE COURT: That doesn't make any sense for you to ask her if the original is an accurate copy.

MR. CARTER: I'm sorry.

THE COURT: It just makes no sense at all. Rephrase that.

BY MR. CARTER:

Q. Ms. Jones, is Plaintiff's Exhibit 1 a duplicate exact copy of the original note in front of you?

A. Yes, it is.

Q. And is the original mortgage in front of you also an exact duplicate of Plaintiff's Exhibit 2?

A. The copy does not include this yellow sticker right here and doesn't include these numbers here, but everything else appears to be the same.

MR. CARTER: Your Honor, for purposes of the hearing today, can we have -- can we stipulate that the copies of Plaintiff's Exhibit 1 and 2 are exact duplicates -- are exactly the same as the originals which are before this Court?

THE COURT: I don't know. Do you want to stipulate to something?

MR. ELESH: I don't because I haven't seen this so-called original.

MR. CARTER: Your Honor, may I give --

THE COURT: You haven't shown it to him?

MR. CARTER: Yes.

THE COURT: Show it to him.

So, to make the record clear, do you want the original -- what purports to be the original promissory note to be considered designated as Plaintiff's Exhibit 1A?

MR. CARTER: Yes, your Honor.

THE COURT: And do you want the purported original copy of the mortgage to be -- I'm sorry -- the original mortgage document to be considered marked as Plaintiff's Exhibit 2A?

MR. CARTER: Yes, your Honor.

THE COURT: The record will so reflect. From now on when you refer to those documents, refer to them with their designations, that is, Plaintiff's Exhibit 1A or Plaintiff's Exhibit 2A, as well as whatever other description you want to give.

(Brief pause.)

MR. ELESH: So I can stipulate that Plaintiff's Exhibit 1 and 2 are photocopies of what plaintiff has purported to present to the Court as an original mortgage and an original note without agreeing that that is the original note. That's what -- if that's what you're asking me to stipulate to, yes, we can stipulate that they are photocopies of what you presented today.

MR. CARTER: I'm not quite -- I don't --

MR. ELESH: I'm not stipulating that -- the veracity of the original. I'm just stipulating you photocopied what you presented to be an original.

MR. CARTER: Very good. Your Honor, I'm fine to proceed as you indicated as Exhibits P 1A and P 2B.

THE COURT: P 1A and P 2A?

MR. CARTER: Oh, excuse me.

THE COURT: Plaintiff's Exhibit 1A and Plaintiff's Exhibit 2A.

MR. CARTER: Thank you. Thank you for the correction.

THE COURT: They correspond to Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2.

MR. CARTER: Very good. Thank you, your Honor.

BY MR. CARTER:

Q. Ms. Jones, can you tell me, when did Ocwen begin servicing the loan for Deutsche Bank?

A. In December 2010.

Q. And at the time that Ocwen began servicing the loan for Deutsche Bank, would the -- would Exhibits P 1A and P 2A have been transferred to a custodian or vault for safekeeping on Deutsche Bank's behalf?

A. Yes.

Q. And based on Ocwen's records, was the promissory -- strike that.

Based on Ocwen's records, was Plaintiff's Exhibit 1A already indorsed when Ocwen began servicing the loan?

A. Yes.

Q. And how is it that you know that?

A. Because by the time that we requested this collateral file to be sent to our attorney's office in December of 2012, the -- there weren't any notes prior to that stating that the note hadn't been -- needed to be indorsed.

When we received the note directly from Wells Fargo, the custodian, it was -- it was indorsed and it was forwarded to our counsel. There were no other notes indicating that this note was sent out to be indorsed or had even been requested prior to December.

Q. So it's regular -- it's a regular and customary business practice by Ocwen that any time a person requests physical custody of P 1A, that Ocwen would check to see if an indorsement is needed?
A. Yes, an indorsement or an allonge.
Q. And based on your review of Ocwen's records, there's no indication that a missing indorsement was needed so that Exhibit P 1A -- excuse me -- that an indorsement was needed for Exhibit P 1A?
A. Correct.
Q. And it's based on that that you are telling me today that the note was indorsed when Ocwen began servicing the loan?
A. Correct.
Q. What can you tell me about the indorsement on page 3 of Exhibit P 1A?
MR. CARTER: Your Honor, may I approach the witness again so she has -- thank you.
BY THE WITNESS:
A. It is indorsed in blank. And it is signed by a signature -- the signature states -- there's a stamp under it that states Ryan Romanelli, assistant secretary.
THE COURT REPORTER: Can you spell that, please?
THE WITNESS: Sure. R-y-a-n, R-o-m-a-n-e-l-l-i.
BY MR. CARTER:
Q. And generally what's your understanding of what happens to

the note when it's -- is indorsed in blank?
A. When it's indorsed in blank, it becomes the bearer paper of the person that holds the actual paper.
Q. And based on some of the questions and responses that we talked about a few minutes ago, was Deutsche Bank the holder of that -- of P 1A when Ocwen began servicing the loan?
A. Yes.
Q. Is Deutsche Bank the current holder of Exhibit P 1 --
MR. ELESH: Objection, your Honor. I don't know if the legal definition of "holder" has been defined. And I don't know if this is an expert who knows what a holder is.
MR. CARTER: I'll rephrase, your Honor.
BY MR. CARTER:
Q. Is Deutsche Bank currently in possession of Exhibit P 1A?
A. Yes.
Q. And regarding the loan, when did -- when did Mr. Elesh default?
A. I believe it was December or November of 2011.
Q. And why did he default?
A. Lack of payments.
Q. Were there any other reasons why he defaulted?
A. I believe that we advanced taxes and insurance on his behalf.
Q. So the mortgage requires that Mr. Elesh either pay escrow or to keep the current -- keep the insurance and property

taxes current?
A. Yes.
Q. Has Ocwen received any payments since Mr. Elesh's default?
A. No.
Q. And has Ocwen or Deutsche Bank incurred additional expenses since Mr. Elesh --

THE COURT: How does that go to the issue before me?

MR. CARTER: Your Honor, with regards to the harm or the injury that plaintiffs suffered in terms of whether or not --

THE COURT: This isn't a hearing on whether or not the mortgage has been defaulted.

MR. CARTER: Understandable, your Honor. Then if that's not an issue here, then I'll --

THE COURT: I'm not going to issue a ruling on the merits of the complaint after this hearing. This hearing is for one purpose and one purpose only; and, that is, to determine whether or not the plaintiff, who is suing this defendant on the note, is the actual owner of the note.

MR. CARTER: Very good, your Honor. And that's fine. And I'll cut straight to the chase then.

(Brief pause.)

MR. CARTER: Your Honor, I have no further questions then.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. ELESH:

Q. Ms. Jones, are you aware of any prior default on this specific loan by myself other than the one that you referred to in your testimony?

A. Yes. I did see in our business records that there was a previous foreclosure, but that that foreclosure was reinstated.

Q. And are you aware of the promissory note on that case that was also brought in the Northern District of Illinois in federal court, and it was -- there was a note attached at -- are you aware of that note and any indorsement or lack of indorsement on that note?

A. I believe that in the first foreclosure, that also -- that note contained the same -- that copy -- that complaint contained the same copy that's in this current foreclosure action; and it was not indorsed -- it was not signed. I'm sorry.

Q. So how do you explain the reason it was not indorsed?

A. No. What happened is when this was referred out to foreclosure, the copy that we had in our system was the indorsed but unsigned copy. That copy would have went out --

THE COURT: Wait, wait, wait. What do you mean by indorsed but unsigned? What does that mean to you?

THE WITNESS: It means -- well, it means to me that -- I'm sorry -- there's an indorsement on the last page, but it was not signed.

THE COURT: What do you mean by indorsement? What do you consider --

THE WITNESS: A stamp.

THE COURT: -- an indorsement?

THE WITNESS: The stamp.

THE COURT: A stamp?

THE WITNESS: Yeah.

THE COURT: So say stamp. There was a stamp on the last page, right?

THE WITNESS: Okay.

THE COURT: Okay.

BY MR. ELESH:

Q. When was this alleged indorsement made? What is the date that this alleged indorsement was made?

A. I don't know. It was done prior to Ocwen servicing it.

Q. When you say that --

THE COURT: Well, wait. If you don't know when it was done, how do you know it was done prior to Ocwen servicing it?

THE WITNESS: Because when Ocwen would have received this note, the custodian would have -- I'm sorry. When Ocwen would have began servicing this loan, we would have hired a custodian. At that time the custodian would have held onto this note until we requested it. When we requested it in December of 2012, we received the note. It was indorsed.

THE COURT: How do you know it was indorsed?

THE WITNESS: Because I viewed it.

THE COURT: You saw it?

THE WITNESS: Oh, I'm sorry. It was -- the reason why I know it wasn't -- wasn't indorsed -- was indorsed was because we have a procedure where if we receive an original document and it is not indorsed or it requires an additional allonge, we have to document in our system and track everywhere that note goes prior to sending it out to our counsel. Their -- the -- our business records indicate we requested it in December of 2012. We received it on December 6th, 2012. And it was overnighted to our counsel on December 12th.

This type of a document, because we don't have signing authority for Decision One, would have had to been sent somewhere else to be indorsed, returned back to us and then sent to them. So there's no indication that that happened.

THE COURT: If you received a note that had an actual signature on it, how do you explain the existence in your possession of a note that doesn't have a signature on it?

THE WITNESS: What happens is during the origination process --

THE COURT: What does that mean? What's the --

THE WITNESS: Origination --

THE COURT: -- origination --

THE WITNESS: When the loan is being funded, the back -- back in 2005 --

THE COURT: Being funded by whom?

THE WITNESS: Decision -- Decision One Mortgage Company.

THE COURT: So do you know Decision One Mortgage Company's policies and practices?

THE WITNESS: No, I do not.

THE COURT: Well, then how can you testify as to what happened when they were forwarding the loan?

THE WITNESS: Because I've reviewed loans. I've been in the business now for 13 years, and I have seen the procedure that happens during -- when we've had other cases where a note was copied but it was not the actual original -- finished original note. And then we would have maybe an un- -- we would have a copy of a note that was not indorsed because people take copies during the process of this origination; and that was the one that got into the file, the one that wasn't maybe indorsed or something like that.

THE COURT: But you don't know what happened in this particular case?

THE WITNESS: No. I don't know what happened with

Decision One. I can't say -- I don't have personal knowledge as to --

THE COURT: And you don't know when you received the unsigned note?

THE WITNESS: The copy?

THE COURT: The unsigned document that purports to be a note. Do you know when you received it?

THE WITNESS: We would have received the -- we would have transferred this to our custodian when we began servicing this in September of 2010.

THE COURT: You told me that you would only transfer it to your custodian if it was actually signed; isn't that what you said?

THE WITNESS: No.

THE COURT: So you would transfer an unsigned note to your custodian without verifying that it was signed?

THE WITNESS: No. What will happen is the process would have been, the note would have been sent to the Wells Fargo Bank. As far as if someone at Ocwen would have reviewed that note prior to sending it to Wells Fargo?

THE COURT: Let's go back a second.

THE WITNESS: Okay.

THE COURT: When did you first have any notice whatsoever of this loan?

THE WITNESS: When we began -- me -- we began servicing this in September 2010, so September 2010.

THE COURT: When did you first receive any documents whatsoever regarding this loan?

THE WITNESS: September 2010.

THE COURT: Who would you have received those documents from?

THE WITNESS: From the prior servicer.

THE COURT: And who was that?

THE WITNESS: HomEq.

THE COURT: I'm sorry?

THE WITNESS: I'm going to spell it. H-o-m-e-q. I'm sorry. There might be two Es, H-o-m-e-e-q.

THE COURT: What documents did you receive from HomEq?

THE WITNESS: We would have received copies of the mortgage, the note, the -- any of the origination documents, meaning the application, the HUD-1 statement, the truth-in-lending, copy of a title policy. We would have received possibly hazard insurance information. That's all I can think of right now.

THE COURT: And upon receiving these documents, what is the practice and procedure that you would follow in reviewing the documents?

THE WITNESS: We do have a process where we have a loan setup department that does due diligence. And they review the documents to make sure that we received -- to make sure what we received; did we receive a copy of the --

THE COURT: With respect to the note --

THE WITNESS: Yes.

THE COURT: -- would they review whether the note was -- the copy that you received was signed or not?

THE WITNESS: They would -- I don't know the extent of that review. If they would have reviewed -- if the borrower signed it or if it was indorsed correctly, the copy, I don't know the extent of that review.

THE COURT: Okay. So you don't know when the note was received, just based upon your procedures, whether the note that you received was signed?

THE WITNESS: Are we talking about a copy of the note or the actual note?

THE COURT: I'm talking about whatever document you told me you would first receive.

THE WITNESS: Okay. Ocwen would have received copies of the note when we began servicing this loan.

THE COURT: Okay. Now stop right there. Who would have reviewed the copy of that note?

THE WITNESS: Our loan setup department.

THE COURT: And you don't know whether they would have looked to see if it was signed or not?

THE WITNESS: Indorsed, correct. That's -- I don't know if they would have looked for that.

THE COURT: So you don't know if the so-called note document that you received initially was signed or not; is that correct?

THE WITNESS: The copy or the -- the original? No, I do not know, based on not having personal knowledge of it.

THE COURT: And you don't know if whoever was in your loan setup department would have checked to see if the document they received that was entitled note was signed or not?

THE WITNESS: Correct.

THE COURT: Okay. So when would anyone in your company have checked to see if the note, the promissory note that was in your possession, was signed or not signed?

THE WITNESS: This would have been done when we requested the file from the custodian.

THE COURT: And when was that?

THE WITNESS: We requested it in December of 2012.

THE COURT: So that would have been done three months after you began servicing?

THE WITNESS: No, that was -- we began servicing in September -- September of 2010.

THE COURT: So you did not request to see the actual original note until December of 2012, some two years after you began servicing the loan?

THE WITNESS: Yeah. I did not see any indication in our business records that someone requested the note prior to that.

THE COURT: Okay. Do you, as a matter of practice, receive the original signed note when you receive the documents to begin servicing a loan?

THE WITNESS: No. Those are sent to the custodian. We hire a custodian.

THE COURT: And who was the custodian?

THE WITNESS: Wells Fargo Bank.

THE COURT: Do you know of your own personal knowledge whether anyone at Wells Fargo Bank would have checked to see if the document they received that purported to be the original note was actually indorsed or signed over?

THE WITNESS: I don't know.

THE COURT: Did you make the request in December of 2012 from Wells Fargo for the original note?

THE WITNESS: No.

THE COURT: Who did?

THE WITNESS: I don't recall the name. It would have -- I don't recall the name.

THE COURT: How do you know it was actually requested?

THE WITNESS: Because I saw our -- our -- in our system the comments that were entered.

And when you asked me who requested it --

THE COURT: Stop. Stop right there.

THE WITNESS: Okay.

THE COURT: So when the note was requested, the original note was requested from Wells Fargo, do your records indicate when it was received from Wells Fargo?

THE WITNESS: Yes.

THE COURT: When?

THE WITNESS: December 6th, 2012.

THE COURT: Who received it?

THE WITNESS: That would have been our -- our vault. Someone in our vault.

THE COURT: What was done with the document after that? Do your records indicate?

THE WITNESS: Yeah, the records indicate that the -- the note was received at our vault. And then the note was forwarded to our counsel, our outside counsel, overnight.

THE COURT: The original?

THE WITNESS: Yes.

THE COURT: And who was that? Who was it sent to?

THE WITNESS: It was sent to Morris, Laing.

THE COURT: I'm sorry?

THE WITNESS: The name of the attorney is Morris Laing, L-a-i-n-g.

THE COURT: Do your records indicate whether before it was sent to Mr. Morris Laing anyone verified whether the note was indorsed or signed?

THE WITNESS: There wasn't a note indicating that, no.

THE COURT: So nothing in your records would indicate up to that point when it was sent off to the attorney whether the note was indorsed or signed?

THE WITNESS: There wasn't a note that said it was indorsed or assign -- assigned, but there would have been a note had it not been indorsed or assigned.

THE COURT: Now, you used "indorsed" to mean the existence of a stamp?

THE WITNESS: Yes.

THE COURT: Had there just been the existence of a stamp with no signature, would that have been considered as an indorsed note?

THE WITNESS: In December or you mean period?

THE COURT: In the regular practice of your department, loan setup department, that does the review.

THE WITNESS: I don't know. I use indorsed, and I probably use it incorrectly obviously. I don't know if the loan setup department is more experienced with the terminology and would know that, had this not had a signature, it wasn't considered indorsed. I don't know what they know.

THE COURT: Okay. So the fact that there wasn't a request to verify indorsement or any note to indicate that there was no indorsement does not, to your knowledge, mean that the note either was actually signed or not signed in indorsement; is that right?

THE WITNESS: I'm sorry. Can you say that one more time?

THE COURT: The fact that there wasn't any note indicating that the note was not indorsed does not mean that the note was actually signed? It could mean just simply that there was a blank stamp on it?

THE WITNESS: I don't know if I would say that.

THE COURT: Yes. I would.

Okay. Go ahead, sir. Do you have any more questions you want to ask?

BY MR. ELESH:

Q. I just thought it was interesting, you used the term "signing authority" and you used the term "finished original." Maybe you could explain to the Court, if Ocwen didn't have signing authority for the note, you're saying that who would have signing authority?

A. I'm saying that Ocwen has signing authority on behalf of Deutsche Bank, but they do not have signing authority on behalf of Decision One, who is the entity that would have needed to -- that needs to indorse this note over.

Q. Very good. So following that logic, are you saying that

if you or your colleagues noticed that the note did not have a signature in the appropriate place to act as an indorsement, that it would have -- your institution would have contacted Decision One? Is that what you're saying?
A. We would have had to get the note indorsed, yes.
Q. From whom?
A. From Decision One.
Q. Do you know if Decision One is in business --
A. No, I don't.
Q. -- currently?
A. I'm just speaking of the procedure.
Q. Well, I would hope that -- I mean, this isn't in some of our litigation, but I tried to inform the Court previously that Decision One --
MR. CARTER: Your Honor, objection. He's testifying at this point.
THE COURT: Just ask questions. You're on cross-examination now. Ask questions.
BY MR. ELESH:
Q. So it's your testimony that no one other than someone at Decision One would have been appropriate to indorse the note over to Deutsche Bank; is that correct?
A. I'm saying that no one at Ocwen has the authority to sign a note on behalf of Decision One.
Q. Understood. And are you also saying that only someone at

Decision One could indorse it from Decision One to --

THE COURT: She doesn't know who has got authority to indorse the note.

MR. ELESH: Okay. Those are all the questions I have.

THE COURT: Do you have any more questions?

MR. CARTER: Very briefly, your Honor, yes.

REDIRECT EXAMINATION

BY MR. CARTER:

Q. Would the custodian, Wells Fargo, have any authority or procedures in place to request the signed indorsement themselves?

A. No.

Q. So the only way that that note, if it had come into Ocwen's possession without a signature, would have been through Ocwen?

A. Yes.

Q. And are there any records --

THE COURT: I'm sorry. What does that mean? The only way that that note could have come into Ocwen's possession without a signature would have been through Ocwen?

MR. CARTER: I'll rephrase.

THE COURT: Yes.

BY MR. CARTER:

Q. The only way that -- if -- when Ocwen --

MR. ELESH: Objection. These are leading questions. Maybe --

THE COURT: Yes, but I'm going to allow them.

Go ahead.

BY MR. CARTER:

Q. When Ocwen began servicing the loan, if the note was unindorsed, the only entity --

THE COURT: You better make sure you understand what she's saying when she says unindorsed. I suggest you say either signed -- the indorsement was signed or not signed.

MR. CARTER: Thank you, your Honor. Thank you for clarifying.

BY MR. CARTER:

Q. When Ocwen began servicing the loan, if the note did not have a signature on it --

THE COURT: An indorsement signature.

BY MR. CARTER:

Q. An indorsement signature on it, would the only entity that would have requested a signed indorsement been Ocwen?

A. Yes.

Q. And are there any records in Ocwen's system to indicate that at some point, Ocwen requested that the stamped indorsement be signed?

A. No.

MR. CARTER: No further questions, your Honor.

THE COURT: Anything else?

MR. ELESH: Nothing further.

THE COURT: Can I see the originals, counsel?

MR. CARTER: May I approach, your Honor?

THE COURT: Yes.

(Tendered.)

(Brief pause.)

THE COURT: Ma'am, I want to direct your attention to the document that is labeled Adjustable Rate Note, which we have agreed will be considered as Plaintiff's Exhibit 1A.

When did you first see that document?

THE WITNESS: Me personally? I saw this -- the original, I just saw this today.

THE COURT: That document itself, when --

THE WITNESS: It's the original.

THE COURT: -- did you first see it?

Just that document, Exhibit --

THE WITNESS: Yes, today.

THE COURT: -- 1A, Plaintiff's Exhibit 1A, when did you first see it?

THE WITNESS: Today.

THE COURT: Okay. Do you know where it came from?

THE WITNESS: Originally or you mean from today? My attorney brought it with him today.

THE COURT: Your attorney brought it with him today?

THE WITNESS: Yes.

THE COURT: But you don't know where he got it?

THE WITNESS: Yes, he got it from --

THE COURT: Do you know of your own personal knowledge where he got it? Did you obtain it for him?

THE WITNESS: No.

THE COURT: Okay. If that document had been in the possession of Ocwen, where would it have been kept?

THE WITNESS: This document wouldn't -- it would have been kept in our vault had we assigned ourselves as the custodian.

Temporarily while it was in our possession from 12/6 to 12/12, it would have been kept in the vault until it was time to send it to whoever the rep was going to overnight it to our counsel.

THE COURT: It would have been kept in your vault?

THE WITNESS: Yes.

THE COURT: Do you have any records to indicate whether that particular document was actually kept in your vault at any time before you first saw it?

THE WITNESS: There's records -- oh, before I first saw it? Prior to --

THE COURT: Before --

THE WITNESS: It was kept in our vault in December when we -- when we received it.

THE COURT: What record do you have that that document actually was kept in your vault as opposed to a copy?

THE WITNESS: Because our business records state that the original note was received in the vault or that office.

THE COURT: Okay. I have nothing else. Any other questions?

MR. ELESH: No, sir.

MR. CARTER: No, your Honor.

THE COURT: You may step down, ma'am.

MR. CARTER: Your Honor, I have no further witnesses to call.

THE COURT: All right. We're going to call the next case now. Have a seat and relax.

(Recess taken.)

THE CLERK: Recall, 12 C 3644, Deutsche Bank v. Elesh.

MR. CARTER: Again, for the record, Justin Carter appearing on behalf of plaintiff.

MR. ELESH: Herbert Elesh, defendant.

THE COURT: Is there any other evidence to be presented?

MR. CARTER: None from the plaintiff.

MR. ELESH: No, sir.

THE COURT: Okay. Do you wish to argue?

MR. CARTER: I'm sorry?

THE COURT: Do you wish to argue the motion?

MR. CARTER: Yes, your Honor. Yes, I'm happy to argue the motion to dismiss for lack of standing. I believe that's the motion in front of this Court.

Your Honor, with regards to the motion, the testimony today that you heard from Ms. Jones indicated that while Ocwen doesn't necessarily have a business record to reflect at the point in time when the loan -- when the note was sent to the custodian, as to whether or not it was or was not signed, the indorsement, the records do indicate -- or rather the lack of records indicate that no signed indorsement was ever requested, which would mean they had, in fact, received it signed and indorsed from the prior servicer.

THE COURT: Why don't you go back and explain to me what the evidence is that shows that Deutsche Bank National Trust Company is the owner of this IOU.

MR. CARTER: Yes, your Honor. As Ms. Jones stated, Ocwen is the servicer for Deutsche Bank, which means they act as their attorney-in-fact.

THE COURT: And how do I know that?

MR. CARTER: She stated that on the record, your Honor. That was one of the first questions I think I asked.

THE COURT: Okay.

MR. CARTER: A couple of questions I asked into it.

And as the servicer, their responsibility is to service a loan on behalf of Deutsche Bank. And I asked Ms. Jones whether or not Deutsche Bank is in possession of the note. Granted, if you're talking actual possession, it's in my possession right now; but because I am the attorney for Deutsche Bank and Ocwen is the servicer for Deutsche Bank, we are, you know, by extension their agents obviously. So the fact that I'm in possession or Ocwen is in possession of the original note, that means Deutsche Bank is in possession of the original note.

And because the original note is indorsed in blank to no one, that makes it bearer paper under Illinois UCC law so that Deutsche Bank, as the holder of the note, is entitled to enforce the provisions therein and foreclose on the mortgage which follows the note.

So for that reason, Deutsche Bank does have standing to proceed with the foreclosure. They're the appropriate party to bring this action.

THE COURT: Okay.

MR. ELESH: With the first issue of business records, the fact that there's a lack of notation is not conclusive. The fact that something is omitted doesn't make it conclusive that that activity or conduct was performed. There's -- that's quite a leap of logic.

Secondly, I want to reiterate to the Court that this is the second case for the same mortgage that Deutsche Bank has brought against me as a defendant. If you go into PACER, you can see that they -- this is the second time that I caught up on the loan -- the first time -- and then they refiled this case last year.

And her testimony, Ms. Jones, also corroborated the fact that the exhibit that they used in that prior case also lacked an indorsement. So if they're going through these procedures, it's amazing that twice -- not once but twice -- this -- the so-called due diligence didn't work or didn't catch the lack of indorsement.

And as for the UCC argument, yes, it's bearer paper if it's signed, if it's indorsed.

I have done my best over the last nine months to litigate this case, to have the truth come out. To then allow Deutsche Bank in this case or in any case to switch the exhibit eight months into a case is fundamentally unfair. It puts me in a position where I'm doing discovery, but it's meaningless. I get discovery --

THE COURT: Wait, wait. Does that go to the issue of standing?

MR. ELESH: It does because the note was unindorsed as Exhibit B of the complaint. And then when I asked for it in a request for production and it was Bates stamped by -- at that time, I did have an attorney -- and that same document again was unindorsed. So now eight, nine months into the case, I mentioned this to opposing counsel after we left. I said you have a real problem with the note. And then they scrambled. They scrambled. I filed the motion to dismiss. And then magically, only after I told them -- only after I informed opposing counsel that this is a serious flaw, that's when they somehow resurrected this document, which is -- I thought they would have done like a motion to the Court and said we want to amend the complaint. No. They just thought they would slide it in there as a response to my motion to dismiss.

And the other thing is, for standing, we haven't mentioned it today, but I've been arguing from the beginning that this is also a trust and that there was a closing date on the trust; and if there was no indorsement into the trust or a signature with a date that shows it was -- the note was conveyed prior to the closing date, which is in July of 2005, then that's another reason why Deutsche Bank lacks standing. It's not only because of UCC and bearer paper, but it's also, they didn't follow their own trust.

So I've done my best to have the truth come out. And I think her testimony today about what's a signature versus what's an indorsement, that seemed to grab the interest of the Court, and rightfully so. You know, Deutsche Bank shouldn't be able to have standing if the testimony wasn't convincing that they understood what had to take place and that it did take place.

Thank you.

MR. CARTER: Your Honor, very briefly.

The argument with respect to the closing date of the trust and the pooling and servicing agreement, as we indicated in our response and in our various motions throughout this case, that is irrelevant to these proceedings. And cases have found that time and time again. Because Mr. Elesh is not a party to any type of pooling and servicing agreement that was set up when this loan was securitized, therefore, he cannot bring any challenges under that and state that Deutsche Bank somehow breached the pooling and serving agreement and bring that on behalf of someone else. So --

THE COURT: Slow down. I can't understand what you're saying.

MR. CARTER: I was saying, your Honor, that the pooling and servicing agreement that is executed between the depositor, in this case probably was Decision One Mortgage.

THE COURT REPORTER: Counsel --

THE COURT: In this case was what?

MR. CARTER: It was in this case Decision One Mortgage.

THE COURT: Don't lower your voice.

MR. CARTER: I'm sorry.

THE COURT: Raise it.

MR. CARTER: Okay. In this case it was Decision One Mortgage and the other various parties involved, like HomEq, for example, who serviced the loan originally.

Mr. Elesh cannot bring challenges under that pooling and servicing agreement because he was not a party to that agreement. He was not -- and he's not a third-party beneficiary to that agreement either, which would provide him with standing to sue for violations of the pooling and servicing agreement.

With respect to the note, again, as indicated in our brief, time and time again in Illinois, in order to foreclose, you have to show you're the holder of the note. And by virtue of the fact that we have -- my client has the original note indorsed gives them standing. Mr. Elesh has not indicated if there is someone else attempting to collect this money from him or foreclose the mortgage separately. If it's not Deutsche Bank, your Honor, I don't know who it would be because we have the note.

So, your Honor, with -- so respectfully, we'd request that you would deny the motion to dismiss for lack of standing.

THE COURT: Well, the reason we indicated that this hearing was necessary was because we had substantial doubts as to whether you did, in fact, have possession of a properly indorsed note.

And the basis for our concern and our doubt was the fact that you had produced two separate documents; one which was clearly not indorsed but was labeled as a true and correct copy of the original note upon which your lawsuit was based and attached to your complaint; and then a subsequent document, which was -- I'm sorry. Do you have the original?

MR. CARTER: I do, your Honor.

THE COURT: Let me have it back, please. Plaintiff's Exhibit 1A.

(Tendered.)

THE COURT: We have this other document, which we've designated as Plaintiff's Exhibit 1A, the purported original note, which you presented to the Court after filing your complaint and months after the case was in progress, which purports to have signatures.

And the question for the Court was, is this the actual original note and was it actually signed, was the indorsement actually signed over.

And I haven't heard any evidence really going to that particular issue. The closest you've come is that your client has said that -- or your witness said that if they had not received a properly indorsed note, there would have been a notice of that in their records and they would have requested that that be rectified. And she noticed no such note and no such request.

The problem with that, first, is that it calls for an inference, essentially a negative inference, that because there was no exclamation that there was something wrong, that, therefore, there was nothing wrong. And that's kind of a weak evidentiary presentation.

And the second is that your witness clearly doesn't know what it means to have a document be properly indorsed. She was clearly under the impression that a blank stamp without a signature was an indorsement. That's how she testified throughout her testimony. And if that's the case, then it could absolutely be that the note that you received -- that your client received was not indorsed and doesn't explain why this other document, this Exhibit 1A, with a signature on the blank indorsement suddenly appears.

I have had no explanation for that. Nobody has said to me, well, this is what happened. The person who received this Adjustable Rate Note, Plaintiff's Exhibit 1A, who would have seen the signature on it when it was received and, therefore, be able to give some testimony that at least there was a purported signature on it when it was received hasn't testified. I don't know who that person is.

The note would have been received from the prior servicer, which was, what? Wells Fargo?

MR. CARTER: HomEq, your Honor.

THE COURT: Yes, HomEq. There's no testimony from them as to the document that they got, whether it was signed or not.

It's almost 12:00 o'clock. We'll resume this at 1:30 because I want to consider the evidence that's been presented because I'm not -- I have to review all the evidence that's been presented and the testimony.

Really the issue here was the authenticity of this signature, and nobody has testified to that. There hasn't been a single piece of evidence presented as to whether this -- what looks like a one-letter signature kind of a wavy line -- was actually the signature of an agent of Decision One Mortgage Company indorsing this note in blank. I still don't know that.

And although given the -- by the way, the Adjustable Rate Note, Plaintiff's Exhibit 1A, which is supposed to be the original, has a stamp on the first page which says that this is certified to be a true and exact copy of the document actually executed at the closing.

This signature -- purported signature is clearly not a copy. It's not a Xerox. It's an actual signed ink signature. So if this is supposed to be an exact duplicate of the original, you would have to wonder why the indorsement -- not only is the indorsement, but the signature of Mr. Elesh here, Herbert N. Elesh, is also in blue ink, is not a photocopy; it's an actual original signature. One would have to believe that Mr. Elesh signed two adjustable rate mortgage notes at the time of closing. Does that make sense to you?

MR. CARTER: No, your Honor.

THE COURT: I have no explanation for that.

We'll retire to consider the evidence and return at 1:30.

MR. CARTER: Your Honor, will you be keeping the original note?

THE COURT: I will be. They will be safe.

MR. CARTER: Thank you.

(Hearing recessed until 1:30 p.m. of the same day.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of July 1, 2005, Morgan Stanley ABS Capital I Inc., Trust 2005-HE3 Mortgage Pass-Through Certificates, Series 2005-HE3,	)	
Plaintiff,	)	
v.	)	No. 12 C 3644
HERBERT ELESH,	)	Chicago, Illinois
	)	May 20, 2013
Defendant.	)	1:30 p.m.

TRANSCRIPT OF PROCEEDINGS - EVIDENTIARY HEARING
BEFORE THE HONORABLE RONALD A. GUZMAN

APPEARANCES:

For the Plaintiff: MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
BY: MR. JUSTIN FOREST CARTER
One East Wacker Drive
Suite 2500
Chicago, Illinois 60601
(312) 383-6492

For the Defendant: MR. HERBERT N. ELESH
Pro Se
401 South Milwaukee Avenue
#160
Wheeling, Illinois 60090
(847) 465-1900

(Proceedings heard in open court:)

THE CLERK: 12 C 3644, Deutsche Bank v. Elesh.

MR. ELESH: Good afternoon. Herbert Elesh, defendant.

MR. CARTER: Good afternoon, your Honor. Justin Carter appearing on behalf of the plaintiff.

THE COURT: Good afternoon.

Okay. Does anyone have anything else they wish to say?

MR. ELESH: No.

MR. CARTER: No, your Honor.

THE COURT: Okay.

The Court has reviewed its notes regarding the testimony. I've reviewed the documents. And my findings are as follows:

I'm left with serious doubts as to plaintiff's standing to sue for breach of this promissory note. I say that for these reasons, among others: The promissory note in question was first viewed by the Court in the form of an attachment to the complaint. That note, which, according to the complaint, was a true copy of the promissory note upon which the complaint was based and was attached as an exhibit to the complaint, indicated that the borrower promises to pay $147,600 to Decision One Mortgage Company, LLC.

The note as attached to the complaint contained in the upper left-hand corner what appears to be an inked rubber stamp -- a portion of an inked rubber stamp. If one looks closely at the top line of that what appears to be an inked rubber stamp, you can read the word "Romanelli." Below that is a line, which appears to be a signature line, with no signature on it. And below that are the words "true and certified copy."

The words "true and certified copy" overlap the first two words of the introductory paragraph of the purported Adjustable Rate Note so that it's difficult to read the first two words, which are "this note."

On the other side of that front page, the top right-hand corner, is what appears to be another rubber stamp, inked rubber stamp, which is also only partially legible. The parts that can be read are "certify this to be a true and exact copy of the document executed at closing."

And written over that stamp is an illegible signature. To this date, we know not whose signature that is, when that stamp was put on this exhibit, why there is another stamp on the left-hand side of the page which purports to apparently certify it as a true and certified copy, whether the stamp on the left-hand side, which appears to bear the word Romanelli, the last name Romanelli, pertains in any way to the illegible signature on the stamp on the right-hand side of the page.

The last page contains a photocopy of a signature of Herbert Elesh -- it appears to be Herbert N. Elesh -- written on a line; and underneath the line are the words typed out "Herbert N. Elesh" as the borrower.

Now, on the lower left-hand corner, this document includes another what appears to be an inked stamped impression or it could be just typing; we're not sure; nobody has ever explained it or testified to it. This stamp reads, "Pay to the order of without recourse Decision One Mortgage Company, LLC, by," colon, and then there is a line for a signature, but there is no signature on the line whatsoever. There is not a faint signature. There is not any mark whatsoever on the line that would tend to indicate that it had ever been signed.

That's the first document that was presented to this Court as the adjustable rate mortgage contained as an exhibit attached to the complaint.

The second document which this Court comes across, which also purports to be the adjustable rate mortgage in this case, is similar to the first but different in several important respects.

First, this document does not contain a stamped or inked impression on the left upper corner of the first page whatsoever. None. No explanation has been given to the Court or anyone else for that difference or what the significance is.

It does contain the same inked impression on the upper right-hand corner of the page.

This Adjustable Rate Note document, by the way, is labeled as Plaintiff's Exhibit 1 for purposes of the hearing.

On the last page of Plaintiff's Exhibit 1 are, again, some noticeable differences. The last page contains the same stamped or inked impression on the left lower corner of the page.

This particular stamp, however, does contain what appears to be a signature, although a totally illegible signature. And it appears to be a photocopy of the signature, as can be seen from the fact that it is black and it is somewhat faded and, thus, is different from the first document which contained no signature on that stamp whatsoever.

So this document reads, "Pay to the order of without recourse Decision One Mortgage Company, LLC, by," and then an illegible signature on the line.

Also different in this document is that below that signature line, there's still another line that appears to be a signature line. And underneath that, we read the name Ryan Romanelli -- it appears to be an inked impression from a rubber stamp -- assistant secretary. That line, as well as the purported signature, do not appear on the first document. We have not received an adequate explanation for why this document contains this added information and the first document, the first note that was attached to the original complaint, does not.

Then during the course of the hearing, the Court was presented for the first time with what purports to be the original Adjustable Rate Note and which we have designated as Plaintiff's Exhibit 1A for purposes of the hearing. This document is different from the other two, also in significant ways.

First, it does not contain the stamped impression on the upper left corner of the first page that the document attached to the complaint contained. It has no stamp there whatsoever, from which we can only conclude that the stamp was placed some time -- the stamp was placed not on this original document at all, but on some photocopy of this document at some later time.

However, it does contain the very exact same stamped impression in ink on the upper right-hand corner of the first page, which says, strangely enough for an exhibit that purports to be the original Adjustable Rate Note, the first word can't be read, but the second word and thereon reads, "Certify this to be a true and exact copy of the document executed at closing." And overwritten on that is an actual illegible signature, not a photocopy of a signature, but an actual signature as can be seen from the fact that it is in blue ink and clearly is not a photocopy but is an actual impression from a ballpoint pen.

Why an original Adjustable Rate Note would be stamped "certify this to be a true and exact copy" has not been explained to the Court by anyone. What the significance of that is we do not know; and nobody has explained how we can consider this to be an original document when on the face of it, it says it's a certified copy.

The last page of this document, Plaintiff's Exhibit 1A, also notes, on the left lower corner, "Pay to the order of without recourse Decision One Mortgage Company, LLC, by," and then we have the same illegible signature that we saw in Plaintiff's Exhibit 1, only this is not a photocopy of the signature; it is the actual signature as can be seen from the fact that it is blue ink and clearly comes directly from a ballpoint pen, is not a photocopy. It also has at the bottom, the second line for signature, with the name Ryan Romanelli, assistant secretary.

There has been no adequate explanation on the record as to why we have three significantly different versions of what purport to be the same Adjustable Rate Note document.

The Court also notes that the three pages of Adjustable Rate Note, Plaintiff's Exhibit 1A, which purports to be the original note, the three loose pages appear not always to have been joined together.

We note that pages 2 and 3 of Plaintiff's Exhibit 1A have corresponding staple marks or holes in them that line up the way they would if two documents had been stapled together.

The first page of Plaintiff's Exhibit 1A has the same puncture holes that line up with the second and third pages, but also has a separate set of puncture holes that do not exist on the second or third pages and line up therefore with nothing, tending to indicate that this first page may have been part of a separate document; or at the very least, that another document was attached to it that was not attached to pages 2 and 3, calling into question the authenticity of the document which purports to be the original Adjustable Rate Note upon which the plaintiff's standing to sue relies.

The Court also notes that no one has testified as to who Ryan Romanelli is, what he is the assistant secretary of, what his authority was or is with Decision One Mortgage Company, if any, why he cannot be called to testify, why he was not called to testify, what his present whereabouts are.

No testimony was elicited with respect to the illegible signature on the third page of Plaintiff's Exhibit 1A, whose signature it is. No one was called to testify that they saw this document signed or when it was signed, by whom it was signed or the authority of the person who signed it.

All of these things are, of course, necessary to establish that the document was actually indorsed by a person with authority to do so, thereby making it a negotiable document, the possession of which would give the possessor the ability to sue for breach.

In short, I find that, given all of the conflicting evidence before me, I cannot conclude that the plaintiff has established that it is the holder of the original Adjustable Rate Note upon which the complaint for foreclosure is based. I cannot even conclude that I have seen a true and correct copy, much less the actual original of the Adjustable Rate Note, nor have I been given an adequate explanation as to why that is, if there is any.

For this reason, I find that the plaintiff has failed to establish it has standing to sue.

The Court will issue a short order with respect to its findings.

Anything else?

MR. CARTER: No, your Honor.

THE COURT: Okay.

MR. ELESH: Thank you.

THE COURT: Counsel, I am going to return to you the Plaintiff's Exhibit 1A. But I think that before we do that, we should make a record of Plaintiff's Exhibit 1A since we don't have a copy of it and have never seen this particular document prior to today.

Yes, let's do that. As soon as we're done here, we'll make a copy of this and we will return the originals to you.

MR. CARTER: Thank you, Judge.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Nancy C. LaBella *July 12, 2013*
Official Court Reporter